FILE COPY

FILED
JAN 16 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 476

CHICAGO SUGAR COMPANY,
Petitioner,

vs.

THE AMERICAN SUGAR REFINING COMPANY,
Respondent.

BRIEF OF THE AMERICAN SUGAR REFINING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KENNETH F. BURGESS,
HOWARD NEITZERT,
JOHN R. TAYLOR,
Attorneys for Respondent.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

January 16, 1950.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TABLE OF CONTENTS.

	PAGE
Opinion below	1
Jurisdiction	2
Questions presented	3
Statement	4
Argument:	
The Court of Appeals Has Not Decided Any Important Questions of Federal Law Which Have Not Been or Which Should be Settled by the Supreme Court	6
The Court of Appeals Has Not Decided Any Federal Questions in a Way Probably in Conflict With Applicable Decisions of the Supreme Court	23
The Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings, Nor Sanctioned Such a Departure by the District Court	29
Conclusion	39

CITATIONS.

Cases.

A. E. Staley Mfg. Co. v. Federal Trade Comm'n, 144 F. 2d 221, 223 (C. A. 7, 1944) 36

Aetna Life Ins. Co. v. Sanford, 200 Ill. 126, 130, 65 N. E. 661 (1902) 30

Barnes v. Koontz, 112 W. Va. 48, 163 S. E. 719, 720 (1932) 10

Baxter v. Metropolitan Life Ins. Co., 318 Ill. 369, 149 N. E. 243 (1925) 30

Clemens v. Estes, 22 Fed. 899 (C. C. D. Mass., 1885) ... 10

Corn Products Refining Co. v. Federal Trade Comm'n, 324 U. S. 726, 734, 739, 741, 742, 744 (1945) 25, 26, 27, 28, 36

Corn Products Refining Co. v. Federal Trade Comm'n, 144 F. 2d 211, 214, 217 (C. A. 7, 1944) 27, 36

Eli Mining & Land Co. v. Carleton, 108 Fed. 24, 26 (C. A. 8, 1901) 23

Elizabeth Arden, Inc. v. Federal Trade Comm'n, 156 F. 2d 132, 133 to 135 (C. A. 2, 1946) 27

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988, 994, 995 (C. A. 8, 1945) 27

Federal Trade Comm'n v. A. E. Staley Mfg. Co., 324 U. S. 746, 753, 756 (1945) 25, 26, 27, 28

Federal Trade Comm'n v. Cement Institute, 333 U. S. 683, 725 (1948) 25, 26

Fosburgh v. C. & H. Sugar Ref. Co., 291 Fed. 29, 31, 32 (C. A. 9, 1923) 10

Hubshman v. Louis Keer Shoe Co., 129 F. 2d 137, 140 (C. A. 7, 1942) 30, 37

International Salt Co. v. United States, 332 U. S. 392 (1947) 24

Jennings v. United States, 73 F. 2d 470, 471 (C. A. 5, 1934) 23

Natural Products Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N. E. 840 (1923) 10

Quincy Oil Co. v. Sylvester, 238 Mass. 95, 130 N. E. 217, 218 (1921) 10

Ross v. Raphael Tuck & Sons Co., 91 Fed. 128, 129 (C. A. 2, 1898) 23

Samuel H. Moss, Inc. v. Federal Trade Comm'n, 148 F. 2d 378 (C. A. 2, 1945) 28

Scritchfield v. Kennedy, 103 F. 2d 467, 474 (C. A. 10, 1939) 23

United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 281 (C. A. 6, 1898), aff'd, 175 U. S. 211 10

United States v. Newbury Mfg. Co., 36 F. Supp. 602, 605 (D. Mass., 1941) 10

Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 172, 173 (1915) 10

Statutes.

Clayton Act, Section 4 (15 U. S. C. § 15) 4, 20

Federal Rules of Civil Procedure, Rule 43(b) (15 U. S. C. A. following § 723) 22

Judicial Code, Section 240 (a) (28 U. S. C. § 1254) ... 2

Robinson-Patman Act, Section 2(a) (15 U. S. C. § 13(a)) 4, 14, 29

Robinson-Patman Act, Section 2(b) (15 U. S. C. § 13(b)) 15, 17, 18, 25, 26

Robinson-Patman Act, Section 2(e) (15 U. S. C. § 13(e)) 4, 19, 27

Miscellaneous.

Restatement, Contracts (1932), Sec. 515 10

5 Williston, Contracts (2nd ed. 1936), pp. 4604, 4605 ... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 476.

CHICAGO SUGAR COMPANY,

Petitioner,

vs.

THE AMERICAN SUGAR REFINING COMPANY,

Respondent.

BRIEF OF THE AMERICAN SUGAR REFINING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals (R. 1185 to 1200) is reported in 176 F. 2d 1. The opinion of the District Court, which adopted (R. 1152) the Master's report (SR 1 to 59), is not officially reported.

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was entered on July 11, 1949 (R. 1201, 1202). On July 28, 1949 the Court of Appeals entered an order extending to August 15, 1949 the time within which Chicago Sugar Company might file a petition for rehearing (R. 1203). On August 12, 1949 Chicago Sugar Company filed said petition (R. 1203), which was denied without opinion on September 14, 1949 (R. 1204). The petition for writ of certiorari was filed in this Court by Chicago Sugar Company on December 8, 1949. Petitioner seeks to invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (now 28 U. S. C. § 1254).

QUESTIONS PRESENTED.

The following questions were decided by the Court of Appeals:

1. Could respondent have lawfully required customers holding January 4th 30-day contracts to furnish specifications for the delivery of contract balances during the month of March, 1937?
2. Did respondent's course of conduct in omitting to require specifications during March, 1937, in reinstating guarantees and reentering contract balances on May 12, 1937, and in offering to cancel such balances on May 26, 1937, discriminate as to prices, services or facilities against the petitioner?
3. Was there any reasonable possibility that the above described course of conduct might have injured, destroyed or prevented competition?
4. Did respondent's offer, from November, 1936 to May, 1937, of the so-called manufacturer's contract for the sale of sugars to manufacturers only, over a period of one year, at a price of from .075¢ to .15¢ per pound higher than the 30-day contract price currently offered to all purchasers; the repricing on May 24 and May 26, 1937, of sugars delivered under manufacturer's contracts entered on January 4, 1937, to extend to customers holding such contracts the same terms as had been extended to other customers buying 30-day contracts on January 4; and the offer to cancel undelivered balances on manufacturer's contracts on May 26, 1937, injure the petitioner in its business or property?
5. Was there any reasonable possibility that the above described course of conduct with respect to the manufacturer's contract might have injured, destroyed or prevented competition?
6. Was the restrictive clause in the manufacturer's contract that "the goods herein sold are for your own consumption and not for resale" invalid and void?

The Court of Appeals answered all of these questions in the negative, although its determination of any one of the first three and any one of the last three questions was all that was necessary to its decision.

STATEMENT.

The petitioner, Chicago Sugar Company, brought suit in the District Court for the Northern District of Illinois against the respondent, American Sugar Refining Company, charging violations of Sections 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. §§ 13(a) and (e)), and praying treble damages pursuant to Section 4 of the Clayton Act (15 U. S. C. § 15). Trial was held before a special master appointed by the District Court, after which the Master made detailed findings of fact and conclusions of law and recommended that judgment be entered for respondent. The District Court adopted the Master's report* and entered judgment as recommended. In a unanimous decision, the judgment was affirmed by the Court of Appeals for the Seventh Circuit.

The facts of the case are not correctly stated in the petition ("Statement of Matters Involved," pp. 3 to 16). By a synthetic arrangement of isolated excerpts from the record the petitioner presents a theory of the facts of the case which has been rejected successively by the Master, the District Court and the Court of Appeals. The object of petitioner's statement can hardly be to persuade this

* Necessarily reprinted in the supplemental record (SR 1 to 59) because of petitioner's failure to include in the report as reproduced in the record the record page numbers corresponding to the typewritten transcript references cited and relied upon by the Master.

Court to review the record and make new findings of fact, especially since the Master's findings, affirmed by the District Court and the Court of Appeals, were amply supported by the evidence. Apparently petitioner's purpose is to show that on facts different from those presented by this case, the legal conclusions of the Court of Appeals were erroneous.

The facts of the case are stated in the Master's report and summarized in the opinion of the Court of Appeals (R. 1185 to 1192, 1194 to 1196; SR 1 to 50). Insofar as they are material to the issues raised by the petition they will be considered in connection with what the petitioner has designated as "reasons for review."

ARGUMENT.

The reasons for review urged by the petitioner are here considered in the order in which they appear in the petition.

1. The Court of Appeals Has Not Decided Any Important Questions of Federal Law Which Have Not Been or Which Should Be Settled by the Supreme Court.

(Pet'n pp. 21, 22)

From a list of twenty "questions presented" which appear in the petition (pp. 16 to 20) petitioner designates seventeen as "important questions of federal law" decided by the Court of Appeals and which have not been but should be settled by this Court. An analysis of these "questions" shows that each of them is not an important question of federal law or was not a question decided by the Court of Appeals or has already been settled by this Court.

(1) *Does the Robinson-Patman Act apply to sales of commodities to manufacturers identically as to other purchasers?*

That the Act applies to sales to manufacturers has never been questioned by respondent, and the Court of Appeals did not suggest that manufacturers are exempted from the Act.

(2) *Is it a defense or justification that the manufacturer's contract was offered to meet needs of some manufacturers, or that it served an important economic purpose and the national economy, or that the distributing trade did not want or could not use it, or that its non-discrimina-*

tory sale to the entire sugar trade would involve loss and risks?

The Court of Appeals did not decide that any of the facts stated would be a defense to or justification for discrimination otherwise prohibited by the Robinson-Patman Act. The Court of Appeals, the District Court and the Master found that:

> "The contract was known as a 'Manufacturer's Contract,' and under it the customer was required to specify definite quantities and periods for the delivery of the sugar, and the price was higher than the price at which 30-day contracts were offered to the distributing trade. The contract did not carry any guarantee against decline in price, and buyers were required to obligate themselves not to re-sell the sugar and agree to use the sugar solely for their own manufacturing purposes. Without the covenant, sugars sold to manufacturers could have been resold by the manufacturers in competition with sugars offered by the distributing trade, but defendant took precautions to insure observance of the covenant obligating the manufacturer not to re-sell the sugar. No part or portion of the sugar sold under the contract was ever resold.
>
> "The sugar under the 'manufacturer's contract' was offered at a basis price of 4.70 cents. At that time 30-day contracts were offered at 4.65 cents. November 11, a basis price of 4.80 cents became effective for 30-day contracts. November 16, the basis price for manufacturers' contracts became 4.85 cents and thereafter remained at least 5 cents higher than the basis price for 30-day contracts, until the manufacturers' contracts were withdrawn from the market in May, 1937.
>
> "On May 26, 1937, to meet terms offered by its competitors, defendant repriced deliveries under the manufacturer's contract to eliminate carrying charges and to extend to customers holding those contracts the same terms as had been extended to customers buying 30-day contracts on the January 4 move, and offered all such customers the privilege of cancelling.

The announcement did not place manufacturer's contract holders in a more favorable position than that enjoyed by holders of 30-day contracts entered on the January 4 move.

"Plaintiff's president testified that it was hard for him to estimate what real damage was done to plaintiff and when asked whether he knew what damage plaintiff sustained as a result of the matters referred to in the second counts, he testified: 'In a general way, no, because I do not know to whom you (defendant) gave these contracts, whether you gave them to customers of mine (plaintiff's) and cut me (plaintiff) out of a possible profit because of no opportunity of doing business with them or not.' Thereafter it was stipulated that plaintiff made no claim to damages for loss of business or for loss of customers. And there was no proof of any damage caused by the fact that plaintiff was not eligible for the manufacturer's contract. (R. 1195, 1196)

* * * * *

"Here the manufacturers paid more for the sugars than was paid by plaintiff as a distributor, and had the manufacturer's contract been made available to the distributing trade, plaintiff would not have bought sugars under the contract to supply its regular business requirements. (R. 1197)

* * * * *

"Here there was no discrimination between competing purchasers in connection with the offer by defendant of the manufacturer's contract to the manufacturing trade.

"In the instant case there is no proof nor is it claimed that any distributor-competitor of plaintiff bought sugar from defendant under the manufacturer's contract, or that the contract effected any competitive injury between customers competing in the distribution of the sugar." (R. 1197)

The questions decided by the Court of Appeals were questions of fact, not "important questions of federal law."

(3) *Is it a defense or justification that the purchaser discriminated against was speculating upon obtaining a resale profit?*

The respondent has never so contended, and neither the Court of Appeals, the District Court nor the Master passed on the question. The question is not involved in this case. Respondent's evidence that petitioner was speculating upon the price of sugar was offered to show that petitioner's purchases in March, 1937, were not motivated by any understanding on the part of petitioner that it had any contract obligation to take delivery of the sugar.

(4) *Is it lawful for a seller to classify its customers as (a) manufacturers and (b) distributors, jobbers, retailers and consumers, and to exact a covenant that the commodity is to be used by the buyer only in making other products and is not to be resold, in order to make others than manufacturers "not eligible" for discriminatory prices and services given manufacturers, and to prevent resale of the product in competition with the seller's other sales to manufacturers, distributors and other customers?*

The question as stated was not decided by the Court of Appeals because neither that court nor the District Court found that the purpose of the restrictive covenant in the manufacturer's contract was to make distributors "ineligible for discriminatory prices and services" or to prevent resale of the sugar in competition with respondent's other sales. On the contrary, the Court of Appeals, the District Court and the Master correctly found that the manufacturer's contract "price was higher than the price at which 30-day contracts were offered to the distributing trade," that the manufacturer's contract "did not carry any guarantee," that "without the covenant, sugars sold to manufacturers could have been resold by the manufacturers in competition with sugars offered by the distributing trade," and that "there was no proof of any damage

caused by the fact that plaintiff was not eligible for the manufacturer's contract" (R. 1195, 1196). See also findings quoted on pages 7, 8 and 11 to 13 of this brief.

The Court of Appeals did decide that, considering all the facts of the case (see SR 41 to 49), the restrictive covenant was reasonable and therefore lawful (R. 1196). While this finding was not necessary to the court's decision that the offer of the manufacturer's contract did not violate the Robinson-Patman Act, the court in reaching this conclusion was merely applying a well settled principle of law recognized by this Court. See *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 172, 173 (1915), followed in *Fosburgh* v. *C. & H. Sugar Ref. Co.*, 291 Fed. 29, 31, 32 (C. A. 9, 1923).* No "important question of federal law" not yet settled by the Supreme Court was or is involved.

(6) *May a seller charge one price to distributors, including distributors selling to manufacturers, and give a lower price and discriminating services to manufacturers reselling the product in a processed form but not competing with its sale in unprocessed form by the distributors, where the effect of such discrimination is to injure, destroy or prevent competition with the seller who grants such discrimination?*

This question also was not decided by the Court of Appeals. There was no finding that manufacturers were given "a lower price and discriminatory services," or that the offer of manufacturer's contracts by respondent to manufacturers only could possibly have had the effect of in-

* See also *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (C. A. 6, 1898), aff'd, 175 U. S. 211; *United States* v. *Newbury Mfg. Co.*, 36 F. Supp. 602, 605 (D. Mass., 1941); *Clemens* v. *Estes*, 22 Fed. 899 (C. C. D. Mass., 1885); *Barnes* v. *Koontz*, 112 W. Va. 48, 163 S. E. 719, 720 (1932); *Natural Products Co.* v. *Dolese & Shepard Co.*, 309 Ill. 230, 140 N. E. 840 (1923); *Quincy Oil Co.* v. *Sylvester*, 238 Mass. 95, 130 N. E. 217, 218 (1921); 5 Williston, Contracts (2nd ed. 1936), pp. 4604, 4605; Restatement, Contracts (1932), Sec. 515.

juring competition between petitioner and respondent. In fact, the record shows, without contradiction, that there was no reasonable possibility of such injury. See findings of the Court of Appeals quoted on pages 7 and 8, *supra*.

The District Court and the Master also found that:

> "* * * the Manufacturer's Contract was offered on November 9, 1936 at a basis price of 4.70 cents per pound. At that time 30-day contracts were offered at basis price 4.65 cents. On Wednesday, November 11th, a basis price of 4.80 cents per pound became effective for 30-day contracts following the market move of November 9 and 10. (Deft.'s Ex. 92, pp. 212, 214-15.) Because the terms of the Manufacturer's Contract were new to the trade and contract forms were not available, there was considerable confusion and uncertainty among manufacturers as to the meaning and effect of the new contract. (R. 198, 199; T. 604-7.) This resulted in refiners extending the offer of the contract at 4.70 cents basis price for 3½ days to give manufacturing customers an opportunity to make up their minds as to whether they wanted the new contract and if so what percentage of their requirements they wished to buy under that contract form. (R. 679, 198, 199; T. 2906-2908, 604-607; Deft.'s Ex. 92, p. 215.) Monday morning, November 16th the basis price for Manufacturer's Contracts became 4.85 cents per pound and thereafter remained at all times at least 5 cents per bag higher than the basis price for 30-day contracts—until Manufacturer's Contracts were withdrawn from the market in May, 1937. (Deft's Ex. 92, pp. 215, 294; R. 679, 680, 198, 199; T. 2906-8, 604-7.) (SR 41, 42)
>
> * * * * *
>
> "While the Manufacturer's Contract was peculiarly adapted to the needs of the manufacturer and served an important economic purpose both in the manufacturing industries and in the national economy, the contract did not serve any legitimate purpose of the distributing trade nor did it conform to the requirements of the sugar distributor. The president of Plaintiff

corporation testified that Plaintiff would not have bought Manufacturer's Contracts to supply the requirements of its jobbing business nor for the purpose of supplying the requirements of its subsidiary engaged in powdering sugar. (R. 402, 403, 405, 406, 408, 966, 967; T. 1528-9, 1538, 1549, 4019.) The evidence shows that there has never been a demand from the distributing trade for a long term contract. (R. 676, 173; T. 2899, 498-9.) The reasons why the distributing trade did not want and could not use a Manufacturer's Contract were explained by the officials of the Defendant company. The Manufacturer's Contract price was .05 cents per pound higher than the price at which 30-day contracts were currently offered to the distributing trade. To the basis price stipulated in the Manufacturer's Contract was added a carrying charge of from 2.50 cents to 10.00 cents per bag, depending upon when the sugars were delivered. The Manufacturer's Contract did not permit the flexibility of withdrawals which was one of the important features of the 30-day contract. The customer was required to specify definite quantities for delivery during each of the four quarters of the year 1937. The sugars offered under the Manufacturer's Contracts were exclusively manufacturers' bulk grades, which constitute only a small proportion of the total kinds of sugars and styles of packages required by the distributing trade. The credit provisions of the Manufacturer's Contract were exceedingly onerous compared with those offered in connection with 30-day contracts, and as the Manufacturer's Contract price was a firm price the risks involved to a sugar distributor would have been inordinate. (R. 672-675, 771-773; T. 2887-2898, 3249, 3254.)

"Plaintiff contends that had it been eligible for a Manufacturer's Contract Plaintiff would have used the contract to hedge like commitments to its customers. Plaintiff further contends that without such a hedge Plaintiff cannot compete with the refiners and processors in selling sugars to the manufacturing trade for delayed delivery because of the extreme risks in-

volved in making such contracts. (R. 403; T. 1530.) Plaintiff claims to be a competitor of the Defendant in selling sugars to the manufacturing trade and asserts that in denying Plaintiff a Manufacturer's Contract Defendant lessened competition between Plaintiff and Defendant in violation of the Robinson-Patman Act. However, there is no satisfactory proof in the record that Plaintiff would have bought a Manufacturer's Contract to hedge like commitments to its customers if such contracts had been available to Plaintiff. (R. 487; T. 1939-42.) While the vice president of Plaintiff corporation testified that Plaintiff attempted to buy a Manufacturer's Contract from Defendant and other refiners (R. 401, 405, 173; T. 1525-1528, 1536, 499) this testimony is contradicted by other evidence (R. 539, 540, 102; SR. 68-70; T. 2248-9, 2246-8, 147-8), and he admitted that he did not consider the Manufacturer's Contract attractive even from the viewpoint of the manufacturer. (R. 487, 402; T. 1939-42, 1528.) (SR 44, 45)

* * * * *

"The evidence shows that Plaintiff had no demand for Manufacturer's Contracts from any of its customers other than The Purity Bakeries Co. (R. 487, 404, 405, 401; T. 1939-42, 1536, 1523-4.) The fact that Plaintiff was not eligible for a Manufacturer's Contract with the refiners did not prevent Plaintiff from selling a Manufacturer's Contract for 70,000 bags of sugar to this company on the same terms as those offered by the refiners. (Pltf.'s Ex. 135.) If this contract had been hedged with a contract between Plaintiff and a refiner all possibility of gain from the transaction would have been eliminated. (R. 675, 676, 778, 403, 197, 198, 201; T. 2897-8, 3265-6, 1528-30, 600, 603, 617.)" (SR 45, 46)

All of the questions here involved were questions of fact and not "important questions of federal law."

(7) *Does the third Sec. 2(a) proviso (that the Act does not "prevent a seller from selecting its own customers in bona fide transactions and not in restraint of trade") permit a seller to discriminate between its selected customers as to prices and furnishing of services connected with the handling of a commodity, where the seller makes no claim or proof that such price and service discriminations make only due allowance for differences in cost of manufacture, sale or delivery?*

This question was not involved in the case and was not decided by the Court of Appeals.

(8) *Does the fourth Sec. 2(a) proviso (that the Act does not "prevent price changes from time to time where in response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith discontinuance of business in the goods concerned") permit price changes where the "changing conditions" relate only to a decline in the market value of goods previously sold and are not "such as" deterioration of perishable goods, obsolescence of seasonal goods, distress sales, or discontinuances of business?* and

(9) *Does said last mentioned Sec. 2(a) proviso permit price rebates on undelivered goods bought months previously, or does it permit only lower prices discriminatory as to contemporaneous sales but for the emergency nature of the lower-price sales?*

Neither of these questions was decided by the Court of Appeals. No reference whatsoever was made by that court to the "changing conditions proviso" of Section 2(a) of the Robinson-Patman Act.

(11) *Is a seller acting in good faith within the proviso of Sec. 2(b) (which concerns "meeting competition") when it puts out public announcements that its guarantees will expire not later than a certain date, and that they have terminated on that date, and then, six weeks later, reinstates such expired and terminated guarantee, re-enters the unfulfilled, expired contracts to which the guarantee has applied before such termination, and gives price reductions pursuant thereto; and is it exercising good faith, or is such conduct justified, merely because other sellers act similarly?*

This question was not decided by the Court of Appeals because it became moot when the court determined that the proof adduced by petitioner in support of Count I of the complaint (relating to the January 4, 30-day contracts) did not show discrimination.

The Court of Appeals, the District Court and the Master found that:

> "It is clear that plaintiff was not obligated to withdraw sugars under the January 4 contracts within 30 days, and that plaintiff withdrew the sugars voluntarily. It is also clear that no secret terms or concessions had been extended by defendant to any customer holding a January 4 contract. Plaintiff was subjected to no inducements that were not accorded to every other customer. All of defendant's customers were treated alike. All terms applicable to these contracts were made in good faith and publicly announced to meet similar terms offered by defendant's competitors, and all contract holders were privileged to take advantage of the terms so announced. The announcements contained no misrepresentation of fact, nor any suggestion that contract balances be withdrawn; they were made in good faith to meet identical terms previously offered by defendant's competitors and not for the purpose of discriminating against plaintiff, and specifically stated that customers should determine for

themselves whether it was in their interests to withdraw contract balances. The announcements did not constitute a promise or representation that guarantees would not be reinstated. There was no proof that defendant charged one purchaser a higher price for the sugar than it had charged plaintiff under similar circumstances, and there was no evidence that the announcements lessened or tended to prevent competition between defendant's customers. (R. 1194)

* * * * *

"At this time plaintiff was in the same position as all other customers of defendant in that it had the right and privilege as to when and how it would take delivery of sugars booked on the January 4 market move. Defendant did not require plaintiff to withdraw and take delivery of the sugars, nor did the contracts require plaintiff to withdraw or take delivery of the sugars; * * *. (R. 1190)

* * * * *

"Re-entering January 4 contracts involved no making of new contracts, and when contract balances were reentered, the refiners extended to their customers holding undelivered contract balances the same rights and privileges with respect to such contract balances as though the old contracts were cancelled, and upon the customer's request they would cancel undelivered contract balances. (R. 1188, 1189)

* * * * *

"Nevertheless when defendant reduced its basis price in June, it did so in good faith to meet identical terms previously offered by its competitors and not for the purpose of discriminating against plaintiff or any other customer. Plaintiff was accorded all the privileges and advantages of all other customers holding January 4, 30-day contracts. And there was no proof that any of defendant's customers had received more favorable prices or terms with respect to sugar booked on the January 4 move than those received by plaintiff. (R. 1192)

* * * * *

"In this situation, we think the District Court was justified in holding, under the first count of the complaint, that defendant was not guilty of discriminating in price between different purchasers under the January 4 contracts." (R. 1194)

(12) *Is a seller acting in good faith, within said proviso of Sec. 2(b), when it refuses to meet competitive offers of cancellation rights in February-March, 1937 (when it claims it could have resold at the same or higher price any sugar it would obtain through contract cancellation, and when it allegedly desired to have sugar available to supply demands from other customers), but does meet offer of a competitor to grant cancellation rights, on May 26, 1937, after the market price had declined, with further decline imminent and practically no demand for sugar?*

Insofar as reference is here had to any matter other than that involved in question 11, this question was not decided by the Court of Appeals and was not involved in this case. Furthermore, there is no factual basis for the question. The Court of Appeals found that:

"February 25, the Pacific Coast Refiners announced that upon the customer's request, they would cancel undelivered contract balances. This announcement placed customers of the Pacific Coast Refiners on a more favorable basis than customers holding 30-day January 4 contracts with eastern and southern refiners whose outstanding contract balances were unguaranteed and who were not free to enter new business because of such contract balances. Defendant and the other eastern and southern refiners promptly met this competition by extending guarantee terms on January 4 contract balances. Plaintiff did not request cancellation of its January 4 contracts, but its president expressed his satisfaction with defendant's extending guarantee terms to the contract balances." (R. 1189, 1190; see also SR 25, 26)

See also page 26, *infra*.

(13) *Is a seller acting in good faith, within said proviso of Sec. 2(b), when it rebates carrying charges for services furnished buyers and relieves them of decline in market value of sugar bought and sold almost five months previously, because a competitor has acted likewise?*

This question was not decided by the Court of Appeals. The Court of Appeals held that there was no reasonable possibility of injury to competition or damage to petitioner resulting from the acts of the respondent complained of in Count II of the complaint (involving the manufacturer's contract) and found:

> "The announcement merely relaxed the terms of the manufacturers' contracts. Hence in view of what we have already said, it will be enough to say that we agree with defendant that any relaxation of the terms of the manufacturer's contract was not a violation of the Act. The differences in the terms offered manufacturers and those offered distributors as revised by the announcement were justified by the same considerations that we have already pointed out, and this is dispositive of plaintiff's contention." (R. 1198)

(14) *Are all customers offered equal prices, terms, rights, privileges and advantages where, as in the case of the manufacturer's contract, the seller makes certain of its customers "not eligible" to purchase a contract giving special prices for long-deferred deliveries and services not furnished said "not eligible" customers; or where, as in the case of the January 4 contracts, the prices, rights and advantages are offered, to purchasers who had not fulfilled their contracts, many weeks after contrary action by the seller as respects purchasers fulfilling their contracts? And was this unlawful discrimination or merely "results flowing from poor judgment of the buyers"?*

Insofar as reference is here had to any matter or thing not covered by the preceding "questions presented", the issue was not involved in this case and was not decided by

the Court of Appeals. See findings quoted on pages 7, 8, 11 to 13, 15 to 17, 21 and 22 of this brief.

(15) *Were the services for which the carrying charge was made within Sec. 2(e) of the Act?*

The only feature of the manufacturer's contract that was not available to the distributing trade under the 30-day contract (on more attractive terms than those provided by the manufacturer's contract) was the delayed delivery feature. The Court of Appeals held that this feature of the manufacturer's contract could not have injured competition and could not have damaged the petitioner. See pages 7 and 8, *supra*. Thus it was unnecessary for the court to decide whether the delayed delivery feature was "services" within the meaning of that term as used in Section 2(e).

(16) *Should the original, unenforced "paper" terms of the manufacturer's contract as to price, carrying charge, no guarantee, etc. or the subsequent actual prices, guarantee and rebate of carrying charge, be considered in determining whether it effected unlawful discrimination?*

Obviously, both should be and were considered by both the Court of Appeals and the District Court. No important question of federal law is involved.

(17) *Is either unlawfulness of the discrimination, or justification for it, to be determined by the provisions of the Act, or by a so-called "rule of reason" calling for inquiry into and weighing of alleged economic benefits to determine whether the discrimination is "undue or unreasonable" as a prerequisite to determination of its illegality?*

Whether the Master was or was not correct in concluding that "only undue and unreasonable discriminations are prohibited" and that "the rule of reason must be applied"

is no longer material in view of the fact that the Court of Appeals affirmed the judgment of the lower court on other grounds—grounds also held by the District Court and the Master to require the entry of judgment for the respondent.

The Court of Appeals found that the evidence offered in support of the allegations of Count I of the complaint did not show any discrimination against the petitioner. The court also held that the evidence involving Count II of the complaint did not show that there was any possibility that respondent's acts might have adversely affected competition or damaged the petitioner. The court did not pass upon the question quoted above. See findings quoted on pages 7, 8, 11 to 13, 15 to 17, 21 and 22 of this brief.

(18) *Are damages recoverable under Sec. 4 of the Clayton Act, for violation of the Robinson-Patman Act, limited to those resulting from giving one purchaser a competitive advantage over another purchaser; or are damages recoverable that are due to diminishing of the victim's property by payment of money wrongfully induced, to being deprived of the right to buy on an equality with others, and to being subjected to expense burdens and losses from which the discrimination relieved other purchasers?*

The Court of Appeals did not find it appropriate or possible to consider the extent of petitioner's damages since it held that there had been no violation of the law. However, in phrasing the above question, petitioner again indulges in assumptions contrary to the facts of the case. Petitioner speaks of "payment of money wrongfully induced" and "expense burdens and losses from which the discrimination relieved other purchasers." These are not the facts with which the Court of Appeals was concerned. Petitioner voluntarily purchased sugars in March, 1937 while speculating on the enactment of a sugar tax. Petitioner voluntarily held the sugars in inventory when it

could have resold them "without loss to itself and perhaps at a profit" hoping for a still greater profit (SR 33). As far as petitioner's claim for damages under Count I is concerned, the District Court and the Master found:

> "Plaintiff's claims of discrimination apparently are speculative and based upon hypothesis rather than evidence. After a record consisting of 4,000 pages of testimony, stipulations, objections and argument of counsel had been made before the Master, Plaintiff's president testified that he had no favored customer of the Defendant in mind in bringing this suit; that he did not know whether any other customers of the Defendant withdrew January 4th contract balances on more favorable terms than Plaintiff; that he assumed other customers cancelled January 4th contract balances but that he brought this suit without knowing what the situation was with respect to the terms his competitors received with respect to storage. (R. 951, 952, 968, 969; T. 3956-7, 4023-4.) Defendant offered extensive evidence showing prices paid by and the dates of deliveries to other customers in the area in which Plaintiff does business. (Deft.'s Exs. 90, 114.) Plaintiff offered no evidence on this subject whatsoever. It appears from the uncontradicted evidence in the record that Plaintiff was accorded all of the rights, privileges and advantages available to other customers holding January 4, 1937 30-day contracts with Defendant and actually withdrew its contract balances on more favorable terms than its competitors. (Deft.'s Exs. 90, 114; Pltf.'s Ex. 189-X.) It appears from the evidence that a greater percentage of Plaintiff's January 4th contract bookings was delivered to the Plaintiff after April 1, 1937, at 4.70 cents and 4.50 cents basis prices, than was delivered to any other customer of the Defendant in the Chicago area. (Deft.'s Exs. 90, 114; Pltf.'s Ex. 189-X.) Plaintiff cancelled 4,959 bags of its January 4th bookings with the Defendant. (R. 547; T. 2278.) Plaintiff's competitors cancelled only 30 bags. Plaintiff paid an average price of 4.7514 cents per pound for sugars withdrawn under January 4th con-

tracts with Defendant. Plaintiff's competitors paid 4.7794 cents. Eight percent of Plaintiff's January 4th booking was delivered to Plaintiff after April 1st. For sugars so delivered Plaintiff paid an average price of 4.562 cents per pound. Those of Plaintiff's competitors that withdrew sugars after April 1st, withdrew only 7% of their January 4th bookings and paid an average price of 4.753 cents for the sugars so withdrawn. (Deft.'s Exs. 90, 114; Pltf.'s Ex. 189-X.)" (SR 40, 41; see also pp. 15 to 17, *supra.*)

With respect to Count II of the complaint the Court of Appeals held that "there was no proof of any damage caused by the fact that plaintiff was not eligible for the manufacturer's contract" (R. 1196). This statement was clearly justified by the record (SR 49, 44 to 46) and in no sense involves the complicated problem quoted above. Petitioner's supposed damage under Count II of the complaint allegedly resulted from its inability to hedge with respondent a manufacturer's contract between petitioner and Purity Bakeries Co. (SR 45, 46, 82). If the Purity Bakeries contract did result in a loss to petitioner (and there is no evidence that it did) the loss was not due to any act or omission of the respondent. Petitioner elected to make a contract hoping to gain and its loss, if any, was due entirely to its own judgment. If it had hedged the sale (which it would not have done had the hedge been available) all possibility of gain would have been eliminated from the transaction. (See pp. 7, 8 and 11 to 13, *supra.*)

(20) *Was it proper for the Master to permit respondent to cross-examine by leading questions its own officers called by petitioner as adverse-party witnesses under Rule 43(b) of the Federal Rules of Procedure?*

Petitioner admits (Pet'n p. 21) that the Court of Appeals did not rule on this question. In fact, the Master did not place any construction upon Rule 43(b) and made no ruling

on the propriety of any particular question asked thereunder, which could have been before the Court of Appeals for review (SR 134; R. 179, 541, 560). Only five leading questions were objected to and in permitting answers to four of these questions the Master was merely exercising a discretion, which is not subject to review. See *Ross* v. *Raphael Tuck & Sons Co.*, 91 Fed. 128, 129 (C. A. 2, 1898); *Eli Mining & Land Co.* v. *Carleton*, 108 Fed. 24, 26 (C. A. 8, 1901). Moreover, petitioner failed to show from the record as a whole that it was prejudiced by the Master's rulings. See *Scritchfield* v. *Kennedy*, 103 F. 2d 467, 474 (C. A. 10, 1939); *Jennings* v. *United States*, 73 F. 2d 470, 471 (C. A. 5, 1934).

2. The Court of Appeals Has Not Decided Any Federal Questions in a Way Probably in Conflict With Applicable Decisions of the Supreme Court.

(Pet'n pp. 22 to 27)

Most of the so-called questions supposedly decided "in conflict with applicable decisions of the Supreme Court" are merely repetitions of those "important questions" discussed in the previous section of this brief, and as already demonstrated, were not decided by the Court of Appeals at all. In one section of its petition, petitioner urges that certiorari should be granted because these questions have not yet been settled by this Court and in another section argues that certiorari should be granted because the lower court's decisions are in conflict with decisions of this Court.

The decision of the Court of Appeals is in conflict with none of the cases cited by petitioner; it is completely in accord with all applicable decisions of this Court.

(a) The Court of Appeals did not affirm the judgment of the District Court as to the matters involved in Count II

of the complaint because the Robinson-Patman Act permits "differentials in prices as between purchasers depending solely upon whether they purchase for resale * * * or for use in further manufacture", but because the acts of the respondent complained of by the petitioner could not possibly have adversely affected competition or injured the petitioner. See pages 7 to 9, 11 to 13 and 22, *supra*.

(b) The Court of Appeals did not affirm the judgment of the District Court because the "necessities of the parties, or good intentions, motives or results, etc." justified the respondent's acts. The Court of Appeals affirmed the judgment of the court below on other grounds—which were also adopted by the District Court in support of its judgment and which are referred to above. The decisions of this Court cited in the petition involve combinations and conspiracies that unduly and unreasonably restrained trade and commerce and injured competition. It was held that the convenience or good intentions of the parties to these combinations and conspiracies was not a defense to a charge of violation of the Sherman Act; however, these decisions are not in conflict with the decision of the Court of Appeals in the instant case where it appears that the acts complained of could not have injured competition or damaged the petitioner.

(c) The question of whether it is unreasonable *per se* to foreclose competitors from any substantial market was not involved in the case and was not decided by the appellate court. The decision of this Court in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), cited by the petitioner, involved a lease of patented machines conditioned upon an exclusive dealing contract. There is no similarity between the facts of that case and the facts with which the Court of Appeals was concerned herein.

(d) The question of whether it is unreasonable *per se*

by resale restrictions or other agreements between sellers or purchasers, or sellers and purchasers, to limit the market supply of a commodity available for purchase, or the price at which it may be sold was not involved in this case and was not decided by the Court of Appeals. The decision of the Court of Appeals that the covenant restricting the resale of sugar delivered under the manufacturer's contract was valid, while not necessary to the court's decision, is not in conflict with the decisions of this Court, as shown on page 10, *supra*. The cases cited in this paragraph of the petition involve contracts and agreements to fix the price of a commodity sold or combinations to fix prices and other restraints prejulicial to the public interest, or the scope of the patent and copyright laws. In that the restrictive covenant in the instant case did not involve the price of the commodity sold or limit the supply of the commodity or otherwise prejudice the public interest, its legality is established by the line of decisions referred to on page 10.

(e) (f) (g) Petitioner's contentions that the decision of the Court of Appeals places a construction on Section 2(b) of the Robinson-Patman Act that is inconsistent with the decisions of this Court in *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945); *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726 (1945), and *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683 (1948), presupposes this Court's acceptance of petitioner's theory of the facts (rejected by the Court of Appeals, the District Court and the Master) and misconstrues the opinion and decision of the court below. As previously pointed out, the Court of Appeals in affirming the judgment of the District Court did not rely on or construe the proviso in Section 2(b), which permits a seller to rebut a prima facie case of discrimination by showing

that he was meeting the lower price or services of a competitor—although the District Court and the Master found that all of respondent's acts complained of by petitioner were done in good faith to meet lower prices and more favorable terms offered by respondent's competitors. This was true as to the offering of the manufacturer's contracts (SR 43, 44, 41), the repricing and cancellation of these contracts (SR 47 to 49), the re-entry of and reinstatement of the guarantee on January 4 contract balances, the subsequent cancellation of such balances, and the reduction in basis prices in May and June, 1937 (SR 36 to 39).

Even if the Court of Appeals had held that these facts entitled defendant to judgment, such a decision would not have been in conflict with the three cases cited by petitioner. Those cases were concerned with the legality of basing point price systems, and insofar as they dealt with Section 2(b) held that section to be inapplicable because in following the basing point system of a competitor the defendants were not meeting a lower price of such competitor. Thus in the *Staley* case the Court emphasized that "2(b) does not concern itself with pricing systems * * * It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor' " (324 U. S. at 753). The discriminatory practices in that case "were established not to meet equally low Chicago prices of competitors there, but * * * to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system" (p. 756). The *Corn Products* case merely cited the *Staley* case on this point, and both of these cases were followed in the *Cement Institute* case, where it was made quite clear that Section 2(b) does not permit "a seller to use a *sales system* which constantly results in his getting more money for like goods from some customers than he does from

others" (333 U. S. at 725). No such sales or pricing system is involved in the instant case. The acts of respondent of which petitioner complains were all taken in good faith to meet individual competitive situations arising out of lower prices or more favorable terms offered by competitors.

(h) This Court did not decide in *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 744 (1945), "that the Robinson-Patman Act requires only that discrimination under Section 2(e) be made in favor of a purchaser and denied to another purchaser; and that it applies in all cases where the commodity is to be resold, whether in its original form or in a processed product"—and there is nothing in the opinion of the Court of Appeals to support petitioner's contention that its decision places any different construction on Section 2(e) than the construction placed upon that section by this Court. The only question involved in the *Corn Products* case as far as Section 2(e) was concerned was whether the favored customer was a "purchaser of a commodity bought for resale, with or without processing". It is implicit in this Court's opinion in that case that Section 2(e) prohibits only discriminations which may lessen competition—there as between competing purchasers. See 324 U. S. at 734, and the lower court's decision, 144 F. 2d 211, 214, both cited by the Court of Appeals in the instant case (R. 1198). See also *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 994, 995 (C. A. 8, 1945); *Elizabeth Arden, Inc.* v. *Federal Trade Comm'n*, 156 F. 2d 132, 133 to 135 (C. A. 2, 1946), cert. denied, 331 U. S. 806.

(i) The facts in the instant case bear no similarity either to those involved in the *Corn Products* or *Staley* cases or to "respondent's more reprehensible acts" as described in the petition. The essence of the discrimination in the

Corn Products and *Staley* cases was that favored customers were permitted "to take deliveries at an old price, *lower than* the contemporaneous price at time of delivery." In the instant case the "old price" prior to the January 4th move was 4.80¢ (R. 21). The "contemporaneous (market) price at time of delivery" under the January 4th contracts in May and June, was the *same as* the January 4th contract price under the reinstated guarantee, 4.70¢ and 4.50¢. All deliveries under the manufacturer's contract were made either at the contract price or at the current market price; and as was found by the Court of Appeals, there was no reasonable possibility of injury to competition—which also distinguishes this case from the *Corn Products* and *Staley* cases (see 324 U. S. at 741, 742).

(j) There is nothing in the decision or opinion of the Court of Appeals that is inconsistent with petitioner's statement that as to a standardized commodity it is most important that such opportunities as may exist for fair competition should not be impaired.

(k) (l^1) (l^2) The Court of Appeals clearly recognized that Section 2 of the Robinson-Patman Act applies to discriminations between different purchasers which tend to injure, destroy or prevent competition with either the seller or the favored purchaser. The court, after noting that it was not claimed that the manufacturer's contract "effected any competitive injury between customers competing in the distribution of sugar" (R. 1197) went on to consider "the point that the Act applies to discriminations whose effect may be to injure, destroy or prevent competition with any person who grants such discrimination" (R. 1197). The court then held that on the facts of this case there could be no such effect because the parties were not "in competition with each other" (R. 1198) as were the sellers in *Samuel H. Moss, Inc.* v. *Federal Trade Comm'n*, 148 F. 2d 378 (C. A. 2, 1945).

The Court also said that "it cannot be gainsaid that before plaintiff may maintain its suit it must establish that defendant has violated the Robinson-Patman Act, and only discriminations that lessen or tend to prevent competition between customers or between sellers are prohibited" (R. 1193). The court thus very clearly recognized that the Act prohibits injury to competition between sellers as well as injury to competition between customers.

(l[3]) The "changing conditions" proviso of Section 2(a) of the Robinson-Patman Act was not relied upon or construed by the Court of Appeals and is not involved in its decision.

(m) The Court of Appeals did not decide "that only damages resulting from favored purchasers' securing a competitive advantage are recoverable". The Court of Appeals decided that the District Court "was right in holding that defendant had not violated Section 2 of the Act or any part thereof" (R. 1198). As heretofore stated, the court specifically recognized the fact that the Act prohibits injury to competition between sellers as well as injury to competition between buyers and that "discriminations that lessen or tend to prevent competition between customers or between sellers are prohibited" (R. 1193; see page 28, *supra*).

3. The Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings, nor Sanctioned Such a Departure by the District Court.

(Pet'n pp. 27 to 30)

Here petitioner quarrels with the findings of fact of the Court of Appeals (and of the District Court and the Master) and misinterprets and misconstrues its conclusions of law. Petitioner has reference to the following paragraph of the opinion of the Court of Appeals:

"Before proceeding to discuss plaintiff's contention

> it is well to say that parties to a contract always have the right, by agreement or their course of conduct, to waive the requirements of their contract. And it has been held that one of the parties to the contract cannot by a long course of conduct lead the other party to believe that it will not insist upon a strict performance of a duty imposed by the contract, and then without notice insist upon strict performance. *Hubshman* v. *Louis Keer Shoe Co.*, 129 F. 2d 137, 140. What facts will constitute a waiver is a matter of law, but whether the facts exist in any given case is a question of fact. *Aetna Life Ins. Co.* v. *Sanford*, 200 Ill. 126, 130, and *Baxter* v. *Metropolitan Life Ins. Co.*, 318 Ill. 369. We think there was competent evidence warranting the conclusion that by the course of conduct between the parties, the January 4 contracts had been amended as found by the court." (R. 1193)

The Court of Appeals specifically described the respects in which the District Court had found the contracts to have been "amended" as follows:

> "The court concluded that by the public announcements of defendant and by its course of dealing with plaintiff, the provisions of the January 4 contracts were amended and modified; that defendant had waived the provision in the contracts requiring plaintiff to furnish specifications for the delivery of the sugars within the period mentioned therein, and any obligation requiring plaintiff to withdraw the sugars within 30 days or within any other period of time; that plaintiff did not consider itself legally obligated nor was it in fact obligated to withdraw sugars booked under the contracts * * *." (R. 1192)

The Court of Appeals also correctly found that:

> "The parties agree that the language of the contract did not express their true agreement, and both parties disregarded the rights and obligations provided by the contracts with respect to furnishing specifications, the withdrawal of contract balances or the delivery of

> sugar booked under the contracts. They also agree that the contracts were supplemented or modified by the course of dealing between the parties since January 1, 1932, and by public announcements outlining the basis upon which business was accepted under the contracts." (R. 1188)

In view of the uncontradicted evidence in the case (SR 14 to 21) the Court of Appeals was entirely correct in affirming the findings of the District Court that certain provisions of the contract "were amended and modified" and that "plaintiff did not consider itself legally obligated nor was it in fact obligated to withdraw sugars booked under the contract." However, it is obvious from the court's opinion that these findings were not necessary to the court's decision; and it is certainly true that these conclusions of the court do not constitute such departure from the "accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

As far as petitioner's specific complaints are concerned:

(a)(b) It was the petitioner and not the respondent that violated and disregarded the literal terms and provisions of its written contracts; and it was the petitioner that first urged that the "true contract of the parties" was something different from the written agreement signed by the parties (R. 4).

(c) Respondent has not denied what it "solemnly acknowledged in its sworn pleadings". The position of the respondent in this case is and always has been entirely consistent with its pleadings, and not once throughout the trial of the case did petitioner object to evidence offered by the respondent on grounds that the evidence departed from the pleadings.

(d) (e) (f) (g) No evidence was offered by the respondent to vary, supersede or contradict the terms or legal

import of its contracts. Respondent offered evidence to show that petitioner understood that respondent had waived some of the terms of its contracts and the evidence showed conclusively that petitioner did not and has never complied with the literal terms of its contracts with the respondent (SR 18 to 21); and the Court of Appeals, the District Court and the Master so held.

(h) The Court of Appeals (and Master and District Court) merely recognized the indubitable fact that petitioner did not consider itself bound by all of the terms and provisions of its contracts with the respondent—provisions which petitioner had openly and consistently disregarded and violated for many years and which respondent had undoubtedly waived. Any contrary finding would have been a departure from established legal principles and a flagrant disregard of the undisputed evidence.

Although not readily discernible, the matters referred to in this section of the petition involve questions of fact relating to the broader question of whether the acts of the respondent complained of in Count I of the complaint were discriminatory. In defining this issue, the Court of Appeals resorted to the petitioner's brief, saying:

> "In its brief plaintiff says that the issue involves '(a) refusal of cancellation rights in February-March and their granting on May 26, 1937; (b) price reductions on January 4 contracts deliveries under guarantee reinstatement of May 12; (c) relieving buyers who did not take delivery by March 31 of carrying costs—storage, interest, insurance, etc.; (d) enabling such buyers to get sugar at 4.70¢ and 4.50¢.'
>
> "As we understand it, the conduct which plaintiff charges resulted in discrimination arose out of * * * defendant's failure to require all its customers to withdraw January 4 contract balances prior to March 31 * * *." (R. 1192, 1193; see also findings quoted on pages 15 to 17, 21 and 22, *supra*.)

Thus under petitioner's theory of the case, it was essential to establish that there was a legal obligation to withdraw all balances on the January 4th 30-day contracts by March 31, 1937.

Such an obligation could not be inferred from the printed contract form, which provides that the buyer agrees to buy and the seller agrees to sell 100 lb. bags of sugar at the price stated, delivery to be made within 30 days and the buyer to furnish specifications within 15 days. The printed form further provides that if the buyer does not furnish specifications within the 15 days, the "seller (without waiving its right at any time to decline to deliver and/or to hold buyer for breach of contract) may await such specifications and deliver in accordance therewith any time within 60 days after receiving same * * *" (R. 24). The only legal obligations with respect to withdrawals that would seem to arise from the contract as written are an obligation on the buyer to furnish specifications within 15 days and to take delivery within 30 days, and an obligation on the seller to make delivery in 30 days, if specifications are received within the 15 day period.

Petitioner did not furnish specifications for the delivery of January 4th contract balances until March 6, 1937. It then demanded delivery on or before March 31, 1937 (SR 31, 32). In order to show that in spite of the contract provisions, the legal obligation to withdraw, or the delivery period, had somehow been extended to March 31, petitioner advanced the argument that with the introduction of the guarantee into the sugar industry, the delivery period became co-extensive with the guarantee period, and that since here the guarantee ended March 31, that date also became the deadline for withdrawals.

This argument ignores the obvious fact that the original 42-day guarantee applicable to the January 4th contracts

expired on February 15, 1937, by which time petitioner had withdrawn only 7,751 bags of its 100,000 bags booked (R. 188, 654, 536). Moreover, the argument is based on the premise that the 30-day contract form, as supplemented by modifying announcements such as that relating to the guarantee, did not truly state the agreement of the parties, since the announcements as well as the forms contained no suggestion that the delivery period and guarantee period are coextensive. Thus petitioner asked the court "to disregard words used by the parties in their contract" and to rewrite the contract, as it now accuses the court of having done.*

The evidence conclusively demonstrated that there was absolutely no relationship between the delivery period and the guarantee period. The District Court and Master found:

> "The terms of the 30-day contract form requiring purchaser to furnish specifications for the delivery of sugars described therein were relaxed and abandoned by the sellers and ignored by the buyers before guarantee terms were known in the sugar trade. (R. 696, 637, 638; T. 2980-2981, 2723.) In this course of dealing the plaintiff has given no recognition whatsoever to the alleged liability of a customer to withdraw contract balances during guarantee periods. (Deft.'s Exs. 91, 93; R. 366, 415, 438, 439; SR 64; T. 1310-1311, 1576-77, 1676-1677.) On the other hand, the record shows that deliveries have been made under 30-day contracts for many days after the expiration of the guarantee periods applicable to such contracts. (Deft.'s Exs. 91, 93) and discloses announcements of the refiners and processors specifically terminating on different dates guarantee and delivery periods applicable to the same contract. (Deft.'s Exs. 49, 92, pp. 294, 385; Deft.'s

* Petitioner's contention that such a revision of the contract was permissible because of a mistake or respondent's fraud (Pet'n p. 13) is completely without basis in the record.

Ex. 93, pp. 79, 111, 113, 105, 130; Deft.'s Exs. 35, 36, 37, 38, 81; Pltf.'s Exs. 132, 133; R. 1036, 162; T. 4328, 434.) The great weight of the testimony is to the effect that there is no relation between guarantee and delivery periods applicable to 30-day contracts (R. 636, 656, 132, 217; T. 2716, 2793-4, 293-5, 675) and that refiners and processors will and have made deliveries to customers under 30-day contracts (irrespective of whether or not guarantee terms were applicable thereto) until such time as they have notified their customers that specifications for the delivery of contract balances will no longer be accepted. (R. 635-637, 727, 684, 815; T. 2713-15, 2717, 2719, 3094, 2941, 3371.) In every case shown by the record where the refiners have notified their customers that no further deliveries will be made under outstanding 30-day contracts, the delivery periods have been terminated by such announcements after the expiration of the guarantee periods applicable to the contracts in question. (Deft.'s Ex. 93; Pltf.'s Exs. 203, 132, 133; Deft.'s Ex. 35-38, 81.) Plaintiff's conduct and its course of dealing with the Defendant are inconsistent with Plaintiff's contention that 30-day contract holders are obligated to withdraw contract balances within the guarantee periods applicable to such contracts or within any other period. (Deft.'s Exs. 91, 93; R. 366, 415, 438, 439; SR 64; T. 1310-11, 1576-77, 1676-77.)'' (SR 22, 23)

There was thus ample basis for the conclusion of the Court of Appeals that ''plaintiff withdrew the sugars voluntarily. * * * All of defendant's customers were treated alike * * * defendant was not guilty of discriminating in price between different purchasers under the January 4 contracts'' (R. 1194).

The evidence discussed above does not answer the question of when (if at all) January 4th 30-day contract holders were obligated to withdraw contract balances. The answer to this question was immaterial because it was clear that there was no obligation to withdraw such balances in March.

However, petitioner injected this question into the case (R. 122), and the Master and the District Court went on to say that the January 4th contracts were in legal effect option contracts under which petitioner was entitled to buy from respondent the amount of sugar specified in the contract forms, on terms stated in these forms as modified and supplemented by respondent's prior announcements, or on such more favorable terms as might thereafter be announced by respondent as applicable to withdrawals under such contracts, until such time as respondent notified petitioner that further withdrawals would not be permitted (SR 21, 22).

Such an option contract is not a "legal impossibility", as contended by petitioner (Pet'n p. 30), but on the contrary is quite similar to the contract used in the corn sugar industry—a contract referred to as an option by both this Court and the Court of Appeals in *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 144 F. 2d 211, 217 (C. A. 7, 1944), 324 U. S. 726, 739. Likewise, in *A. E. Staley Mfg. Co.* v. *Federal Trade Comm'n*, 144 F. 2d 221, 223 (C. A. 7, 1944), the Court of Appeals referred to a similar contract and described the withdrawal of sugars by customers under such contracts as exercising "their option of converting their bookings into actual sales."

It is not clear from the opinion of the Court of Appeals whether it approved the District Court's interpretation of the legal effect of the contract but it did hold that there was no legal obligation to withdraw the sugars by March 31, which was all that was necessary to its decision. Petitioner insists, however, that the Court took the former course, and contends that in so doing the Court violated the Parol Evidence Rule. Assuming that petitioner is correct in its interpretation of the scope of the Circuit Court's holding on this point, petitioner's fear that the Parol Evidence Rule has been violated

is completely unfounded and the cases cited in the petition, pages 27 to 30, are not in point. It is well settled that conditions of a contract may be waived by a course of conduct which leads one to believe that strict performance of such conditions will not be insisted upon. See *Hubshman* v. *Louis Keer Shoe Co.*, 129 F. 2d 137, 140 (C. A. 7, 1942), cited by the Court of Appeals. In the instant case it is clear from the conduct of the parties that petitioner did not consider the contract to impose any legal obligation upon it to furnish specifications within fifteen days or to withdraw sugars within thirty days or any other period of time. As stated by the Master:

> "Defendant's 30-day contract was first offered to the trade in 1922 (R. 178) * * * The written terms and provisions of the 30-day contract forms requiring customers to specify for delivery sugars booked under the contract within 15 days of the contract date and to accept delivery of such sugars within 30 days of the contract date were ignored by both buyers and sellers from the date of the introduction of the 30-day contract form. (R. 638; T. 2722.) Buyers withdrew sugars if, as and when they desired so to do, and contract balances were held on the books of the refiners and processors and deliveries made against such balances for many weeks following the dates of the contracts. It became common practice for all refiners and processors to make deliveries under 30-day contracts until such time as notice was given to the trade that specifications would no longer be accepted or deliveries would no longer be made, and no effort was made by any refiner or processor to require its customers to withdraw contract bookings. (R. 635, 637-639, 727; T. 2713-14, 2721-22, 3094.) Undelivered contract balances were usually cancelled by the seller at the request of the buyer or with or without his consent when it appeared that it was to seller's interest so to do. (R. 636-638, 90, 165, 180; T. 2721, 2722, 2714-2719, 107, 452, 534.)" (SR 14, 15)

The petition contains several incorrect statements and implications concerning these facts:

(1) Petitioner implies that after the passage of the Robinson-Patman Act the refiners enforced the terms of the 30-day contracts (Pet'n p. 14). There is nothing in the record to substantiate such a theory. Certainly petitioner did not understand that the contract terms were to be enforced, since it did not furnish complete specifications within 15 days after the entry of the January 4th contracts nor take delivery within 30 days, or even 42 days.

(2) Petitioner further argues that customers must have been obligated to take delivery of sugars booked under the 30 day contract if refiners could withhold the "right to cancel" (Pet'n p. 10), and that the granting of this right was nothing more than "termination of the contract by mutual agreement" (Pet'n p. 14). The facts are that refiners followed the general policy of accepting no new business from customers as long as any undelivered balances remained on their books which the customers offering new business could withdraw.* However, if the terms applicable to existing bookings were unfavorable, customers instead of withdrawing such sugars tried to find more favorable terms with other refiners with whom they had no outstanding contracts. In order to avoid the loss of business as a result of this maneuvering, refiners sometimes cancelled undelivered balances or authorized the customers to do so (SR 15; R. 647, 648, 533).

(3) Petitioner suggests that respondent regarded the

* This was what respondent's witness referred to when he stated that by refusing to cancel on February 25, 1937, respondent "required our customers to continue to take the sugar, as they had contracted for * * *" (R. 1120, Pet'n p. 10). Note that petitioner deliberately combines this quotation with the language of the announcement terminating the guarantee so as to create the false impression that there was a legal obligation to withdraw by March 31.

30-day contracts which it offered on the move of June 18, 1937 as legally binding on petitioner (Pet'n p. 15). Obviously the inference sought to be conveyed is incorrect, if for no other reason than that since the June 18, 1937 contracts had not been executed, the letter quoted could not possibly have meant that respondent was going to sue petitioner for any breach. The letter was fully explained by respondent's witness (R. 698, 699).

Finally, petitioner seeks to avoid the conclusion that certain of the terms of the 30 day contract form were waived by suggesting (Pet'n pp. 14, 15) that the conduct found to constitute a waiver was merely an exercise by the seller of its option to "await such specifications and deliver in accordance therewith at any time within 60 days after receiving same" (R. 24). If this be the true legal effect of the conduct of the parties, petitioner's claim of discrimination must fail in that the so-called option to await specifications was exercised uniformly in all cases and whenever a buyer, including petitioner, failed to furnish delivery specifications within the 15 day period.

Conclusion.

The decision of the Court of Appeals was clearly correct. It does not involve any important questions of federal law but is concerned primarily with questions of fact. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH F. BURGESS,
HOWARD NEITZERT,
JOHN R. TAYLOR,
Attorneys for Respondent.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

January 16, 1950.